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Bypass ADA interactive accommodation process at your peril

Discrimination claims are expensive to defend. If they reach a jury, the results are often unpredictable. That's one reason employers need to do everything within their power to preserve the option to file a motion for summary judgment. It's one of the most effective risk and cost containment tool available to employers facing a discrimination lawsuit, and it's especially important in disability discrimination cases.

When it comes ADA disability discrimination claims, employers have to think about litigation as soon as an employee self-identifies as disabled and brings up potential reasonable accommodations.

If a supervisor or HR professional refuses to even consider accommodations—that is, refuses to "engage in the interactive accommodations process"—it but guarantees that the case won't be dismissed at the summary judgment stage, potentially leading to a jury trial.

No record of interactive process

A recent New York Court of Appeals decision, *Jacobsen vs. New York City Health and Hospitals Corporation,* underscores this point. In *Jacobsen*, the Court of Appeals held that an employer that does not participate in an interactive process regarding an accommodation request is thereafter precluded from obtaining summary judgment on any related state or city disability discrimination claims.

Both the trial and appeals courts held that summary judgment was appropriate because, on the facts of the case, there was no reasonable accommodation available that would have enabled the terminated employee to perform the essential functions of his position.

However, there was one dissenting opinion in the Appellate Division's decision. The dissenter noted, among other things, that the record lacked any evidence that the employer had engaged in a good-faith interactive process to determine the existence and feasibility of a reasonable accommodation. Therefore, the dissenter felt that summary judgment in the employer's favor was inappropriate.

'Individualized consideration'

The Court of Appeals concurred with that part of the dissenter's opinion, and reversed the decision granting summary judgment to the employer.

After examining the legislative history and intent of the statutes, particularly the provisions of the New York Human Rights Law, the Court of Appeals held that employers are required to "give individualized consideration" to a disabled employee's accommodation request and that:

"In light of the importance of the employer's consideration of the employee's proposed accommodation, the employer normally cannot obtain summary judgment ... unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation. And the employer cannot present such a record if the employer has not engaged in interactions with the employee revealing at least some deliberation upon the viability of the employee's request."

Because of its broader coverage, the court also held that the New York City's Human Rights Law "unquestionably forecloses summary judgment where the employer has not engaged in a good faith interactive process ...."

The Court of Appeals made clear that, despite its holding, a plaintiff's burden at trial remains the same and that he or she still has to prove the existence of a reasonable accommodation that was requested and denied. Moreover, the Court of Appeals rejected the even harsher notion that the failure to engage in a good faith interactive process compels a grant of summary judgment or a verdict in the employee's favor.

Simple steps prevent trouble

The lesson here is simple. Prudent employers should always at least consider a disabled employee's accommodation request, engage in a dialogue with the employee regarding the feasibility of the accommodation request and suggest potential alternatives if the initial request is not practical.

You should do this even if it seems abundantly clear that no accommodation is possible.

Document your interactions with a disabled employee and how you resolved the employee's accommodation request.

That means training first-line supervisors to report any accommodations requests to HR for review. Supervisors should never have the first and final say on whether an employee is disabled, needs an accommodation or whether one is possible.

You can ensure that you have a fully equipped tool belt to employ in fending off any potential disability discrimination claims if you follow those simple rules.

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